Committee on Resources

Witness Statement

STATEMENT
OF
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BEFORE THE
COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES
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Mr. Chairman and Members of the Committee:

I am pleased to be here today on behalf of the Department of Justice to respond to your request for testimony on the constitutional issues arising from H.R. 4751, 106th Cong. (2000), a bill that provides for "entry of the Commonwealth of Puerto Rico into permanent union with the United States based on a delegation of government powers to the United States by the people of Puerto Rico constituted as a Nation, to guarantee irrevocable United States citizenship as a right under the United States Constitution for all persons born in Puerto Rico, and for other purposes.@

The focus of my testimony will be the three principal constitutional issues posed by H.R. 4751. I will discuss the constitutionality of the statute=s requirement that its terms can be modified only by mutual consent; of its treatment of United States citizenship; and of its provision concerning representation in the House of Representatives. I will begin by discussing the framework of the Department=s analysis.

I.

The framework that governs the analysis of the principal constitutional questions raised by H.R. 4751 embodies two premises.

The first premise is that the Constitution recognizes only a limited number of options for governance of an area. Puerto Rico could constitutionally become a sovereign Nation, as the Republic of the Philippines did. Alternately, it could remain subject to United States sovereignty. It can do so in either of two ways: either it can be admitted into the Union as a State, U.S. Const. art. IV, ' 3, cl. 1, or it can remain subject to the authority of Congress under the Territory Clause, U.S. Const. art. IV, ' 3. cl. 2. As the Supreme Court stated in *National Bank v. County of Yankton*, 101 U.S. 129 (1880), "[a]ll territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress." *Id.* at 133. *See also United States v. Wheeler*, 435 U.S. 313, 321 (1978) ("[A] territorial government is entirely the creation of Congress . . . ."). The terms of the Constitution do not contemplate an option other than sovereign nationhood, statehood, or territorial status.

Currently, Puerto Rico is, from the vantage point of constitutional law, governed under the Territories Clause. Under the Puerto Rican Federal Relations Act, ch. 446, Pub. L. No. 600, 64 Stat. 319 (1950) (codified at 48 U.S.C. " 731b-731e) ("Public Law 600"), an act "in the nature of a compact," Congress provided the people of Puerto Rico with the opportunity to "organize a government pursuant to a constitution of their own adoption." Public Law 600, preamble. Public Law 600 was "designed to complete the full measure of local self-government in the island by enabling the . . . American citizens there to express their will and to create their own territorial government." S. Rep. No. 81-1779, at 2 (1950); *see also Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976) ("purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union"). A Constitution was thereafter adopted by the voters of Puerto Rico and presented to the President and Congress for approval. After being amended to comply with certain congressional requirements, the Constitution was again adopted by Puerto Rico and took effect in 1952.

Despite the great degree of autonomy and self-government in local matters enjoyed by Puerto Rico as a Commonwealth, the Department of Justice has long taken the view that Puerto Rico is subject to the Territory Clause. Past Solicitors General have affirmed Puerto Rico=s territorial status in briefs filed before the Supreme Court, and memoranda and opinions issued by the Office of Legal Counsel have also concluded that Puerto Rico=s status is that of an unincorporated territory subject to Congress= plenary powers under the Territory Clause.

More important, in *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam), in sustaining a level of assistance for Puerto Rico under the Aid to Families with Dependent Children program lower than that which States received, the Supreme Court made clear that the Territory Clause governs the relationship between the United States and Puerto Rico: "Congress, which is empowered under the Territory Clause of the Constitution, U.S. Const., Art. IV, ' 3, cl. 2, to >make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,= may treat Puerto Rico differently from States so long as there is a rational basis for its actions." 446 U.S. at 651-52. *See also Califano v. Torres*, 435 U.S. 1, 3 n.4 (1978) (per curiam) ("Congress has the power to treat Puerto Rico differently, and . . . every federal program does not have to be extended to it.").

The weight of appellate case law provides further support for the proposition that the Territory Clause governs the existing relationship between the United States and Puerto Rico. Following *Harris v. Rosario*, the First Circuit reaffirmed last February that Puerto Rico "is still subject to the plenary powers of Congress under the territorial clause." *Davila-Perez v. Lockheed Martin Corp.*, 202 F.3d 464, 468 (1st Cir. 2000). More recently still, the First Circuit again cited *Harris v. Rosario* in saying last April that "under the Territorial Clause, Congress may legislate for Puerto Rico differently than for the states." *Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34, 44 (1st Cir. 2000). Likewise, the Eleventh Circuit wrote in 1993, A>[w]ith each new organic act, first the Foraker Act in 1900, then the Jones Act in 1917, and then the Federal Relations Act in 1950 and later amendments, Congress has simply delegated more authority to Puerto Rico over local matters. But this has not changed in any way Puerto Rico=s *constitutional* status as a territory, or the source of power over Puerto Rico. Congress continues to be the *ultimate source of power* pursuant to the Territory Clause of the Constitution.=@ *United States v. Sanchez*, 992 F.2d 1143, 1152-53 (11th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994). Accordingly, although Puerto Rico=s status in relation to the United States has been termed "unique," the best view is that, under current case law, the Commonwealth of Puerto Rico remains a territory in the constitutional sense.

The second premise that bears on the analysis of H.R. 4751 is that, as a general matter, one Congress cannot bind a subsequent Congress. This proposition is well-established. In 1803, Chief Justice Marshall noted in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), that, in contrast to a constitution, ordinary legislative acts are "alterable when the legislature shall please to alter [them]." Explaining this principle and its limits more fully in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810), Chief Justice Marshall stated:

> The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.
>
> The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.
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> When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest *[sic]* those rights . . . .

As Chief Justice Marshall recognized, the basic principle that one Congress cannot bind a future Congress is subject to an important limitation -- Congress cannot disregard rights that a previous Congress has vested. Nonetheless, as will be discussed below, the critical point in analyzing H.R. 4751 is the general principle that, to quote Chief Justice Marshall, "[O]ne legislature is competent to repeal any act which a former legislature was competent to pass . . . ." *Id.*

II.

Because of these two premises, H.R. 4751's mutual consent provisions are constitutionally unenforceable. A number of aspects of the proposed statute reflect mutual consent requirements. Section 2(1) provides that the Commonwealth of Puerto Rico is established "in permanent union with the United States of America under an agreement which may not be unilaterally nullified or changed"; ' 3 and ' 3(1) describe the relationship between Puerto Rico and the United States as an "unalterable bilateral pact" that "may not be set aside or altered unilaterally"; ' 3(20) also refers to such an unalterable bilateral pact; ' 3(23) refers to the "bilateral pact" as a "bilateral agreement that recognizes rights and delegates powers, based on mutual consent, and which may not be unilaterally withdrawn or altered"; ' 3(28) provides that "[o]nce any agreement to develop Commonwealth further is negotiated and approved by the United States and the constitutional convention, it shall be in force and effect after it has been approved by the people of Puerto Rico. Any further modification of the terms of the agreement shall have to be approved by the people of Puerto Rico . . . ." The precise ways in which the proposed statute are constitutionally problematic turn on whether the proposed statute is understood as contemplating recognition of Puerto Rico as a sovereign nation or whether it is understood as continuing current Commonwealth status, although in an enhanced form.

As Mr. Farrow has indicated, the bill seems to envision the creation of a new nation. Thus, ' 2 begins with the recitation that Congress "recognizes Puerto Rico *as a nation legally and constitutionally*" (emphasis added). Section 2(1) posits that Puerto Rico is to be established "as an autonomous political body, neither colonial nor territorial." Section 2(5) would authorize Puerto Rico to "arrange commercial and tax agreements, as well as other [undefined] agreements, with other countries and belong to regional and international organizations@B attributes consistent with a sovereign and independent member of the international community. Section 3(11) purports to "delegate[]" "[i]nternational relations functions" of

certain kinds to the United States. Section 3(16) asserts that "[t]he Commonwealth shall control its international trade" and "shall have the capacity and authority to enter into trade and tax agreements." Section 3(17) authorizes the Commonwealth to "execute agreements and belong to regional and territorial bodies." Section 2(23) provides that the bilateral pact "shall have the force and effect acknowledged by . . . international laws." Section 4 states that the governing provisions for the Commonwealth set forth in ' 2 "establish the necessary elements of a legal definition of the political status of Puerto Rico on a basis not subject to the power of Congress over territories." The cumulative force of these provisions is to suggest that H.R. 4751 contemplates that Puerto Rico is to be an independent Nation.

If Puerto Rico is to become an independent nation, as a matter of domestic law, the relationship between the United States and Puerto Rico would necessarily be subject to alteration by a later Act of Congress, even without Puerto Rico=s consent. Congress could not, for example, bind the United States irrevocably to undertake "responsibility for the defense of Puerto Rico and its people, in the identical manner that the United States and its own people are defended," H.R. 4751, ' 3(7). Plainly, the inherent right of national self-defense would justify the United States in refusing to carry out a prior engagement under a treaty or international agreement to defend a foreign country. No such treaty or agreement could remain binding in all circumstances whatever, unalterable by the acts of a later President or Congress. Although the United States unquestionably has the power "to make contracts and give consents bearing upon the exertion of governmental power," including of course contracts "in the international field" with other national sovereigns, *United States v. Bekins*, 304 U.S. 27, 52 (1938), the United States "may not contract away >an essential attribute of its sovereignty.=@ *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996) (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977)); *see also id.* at 923 (Scalia, J., concurring); *Atlantic Coast Line R.R. Co. v. City of Goldsboro,* 232 U.S. 548, 558 (1914); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908); *North Amer. Commercial Co. v. United States*, 171 U.S. 110, 137 (1898); *Illinois Central R.R. Co. v. Illinois,* 146 U.S. 387, 460 (1892) (Government "could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances."). Because the power to make -- and equally to unmake -- treaties is "inherently inseparable from the conception" of national sovereignty, it cannot be contracted away: sovereignty necessarily embraces "[t]he powers to declare and wage war, to conclude peace, to make treaties, [and] to maintain diplomatic relations with other sovereignties." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). Thus, however solemn its undertaking to assist or cooperate with an independent Puerto Rico in the international arena, the United States would be "not completely sovereign," *id.*, if it lacked the power to revoke such an undertaking or to suspend its operation. *See Burnet v. Brooks*, 288 U.S. 378, 396 (1933) ("As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations.").

If H.R. 4751 is read, not as creating an independent country, but as maintaining Puerto Rico=s current territorial status, the mutual consent requirement is equally problematic. As previously discussed, the Constitution contemplates territories and states; it does not contemplate a third status. Since Puerto Rico as an "enhanced" Commonwealth would not be a state, it would necessarily remain subject to congressional power under the Territory Clause. As a result, it would follow that Congress could later unilaterally retract any delegation of power it had made under H.R. 4751 to the government of Puerto Rico. The principle that legislation delegating powers to that territorial government would be subject to later amendment and repeal is an application of the general maxim, discussed above, that one Congress cannot bind a subsequent Congress. As in other areas, delegations of power from one Congress to the government of a territory are generally subject to the right of a later Congress to revise, alter, or revoke the authority granted. *See District*

of Columbia v. John R. Thompson Co., 346 U.S. 100, 106 (1953). Furthermore, although Congress can delegate to Puerto Rico full powers of self- government, such a delegation must be "consistent with the supremacy and supervision of National authority." *Clinton v. Englebrecht*, 80 U.S. (13 Wall.) 434, 441 (1871); *see also Puerto Rico v. Shell Co.*, 302 U.S. 253, 260-62 (1937).

The Justice Department has taken the position that I am articulating here on mutual consent throughout this administration and took it, as well, in the administration of President Bush. In 1991, for example, Attorney General Richard Thornburgh testified against proposed legislation that would have limited the plenary authority over Puerto Rico that Congress had hitherto exercised. One of the provisions of the proposed legislation declared that Puerto Rico "enjoys sovereignty, like a State, to the extent provided by the Tenth Amendment" and that "[t]his relationship is permanent unless revoked by mutual consent." S. 244, 102d Cong., ' 402(a) (1991). This provision, Attorney General Thornburgh stated, was "totally inconsistent with the Constitution" because "[u]nder the Territory Clause of the Constitution, U.S. Const. Article IV, ' 3, cl. 2, an area within the sovereignty of the United States that is not included in a state must necessarily be governed by or under the authority of Congress." *Political Status of Puerto Rico: Hearings on S. 244 Before the Senate Comm. on Energy and Natural Resources*, 102d Cong., at 194 (1991) (Testimony of Attorney General Richard Thornburgh ("Thornburgh Testimony")). *See also Memorandum for the Special Representative for Guam from Teresa Roseborough, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Mutual Consent Provisions in the Guam Commonwealth Legislation* (July 28, 1994).

Under the approach set forth in the Supreme Court=s decision in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), a different result would be warranted if a bill that created a new status for Puerto Rico served to vest rights in that status. In 1963, the Office of Legal Counsel concluded that a mutual consent provision would be constitutional because Congress could vest rights in political status. *Memorandum Re: Power of the United States to Conclude with the Commonwealth of Puerto Rico a Compact which Could be Modified Only by Mutual Consent* (July 23, 1963)**.** In the years that followed, the Department continued to adhere to this position on a number of occasions. *See, e.g.*, Letter for Marlow W. Cook, Co-Chairman, Ad Hoc Advisory Group on Puerto Rico, from A. Mitchell McConnell, Jr., Acting Assistant Attorney General, Office of Legislative Affairs, *Re: Proposed Compact of Permanent Union between Puerto Rico and the United States* (May 12, 1975). As I have said, during the administration of President Bush, the Justice Department altered its position, and our office adheres to that position.

There are two independent grounds that support our current position that Congress cannot vest rights in political status. First, after the issuance of the Department=s 1963 opinion, the Supreme Court concluded that the due process guarantee of the Fifth Amendment applies only to persons, and not to states. *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966); *see also State of Alabama v. EPA*, 871 F.2d 1548, 1554 (11th Cir.), *cert. denied*, 493 U.S. 991 (1989). While *Katzenbach* was concerned with a state, its rationale stands for the broader proposition that a governmental body, including a territory such as Puerto Rico, could not assert rights under the due process clause. Second, the modern Supreme Court case law concerning vested rights is limited in scope. While the Supreme Court has recognized that economic rights are protected under the Fifth Amendment=s due process clause, *see, e.g., Lynch v. United States*, 292 U.S. 571 (1934), the case law does not support the view that there would be Fifth Amendment vested rights in a political status for a governmental body not provided for in the Constitution. *Cf. Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986) ("[T]he contractual right at issue in this case bears little, if any, resemblance to rights held to constitute >property= within the meaning of the Fifth Amendment. . . . The provision simply cannot be viewed as conferring any sort of >vested right= in the fact of precedent concerning the effect of Congress= reserved power on agreements entered into under a statute

containing the language of reservation."). The constitutionally defined means of changing the political status of unincorporated territories would be through the process of incorporation, statehood, or independence.

III.

I next address the bill=s treatment of citizenship. The principal provision bearing on citizenship is section 2(1), which declares that the contemplated agreement between the United States and the people of Puerto Rico "shall continue to be based . . . on the nonrevocability of United States citizenship, acquired by birth and protected by the Constitution of the United States."

My testimony will address the constitutional issues raised by the bill. I realize that the bill would implicate serious policy concerns, and the representatives of the White House, the State Department, and the Immigration and Naturalization Service can collectively address these questions. But, as a matter of constitutional law, Congress has the power to provide both that, after independence, those who are currently United States citizens shall retain their citizenship (even if they choose to reside in Puerto Rico), and Congress could also provide that these citizens could pass United States citizenship to their children, even if born thereafter in Puerto Rico, *i.e.*, outside the United States and subject to the sovereignty of another nation -- an independent Puerto Rico.

Analysis of this issue turns on how the bill as a whole is understood. As I have indicated, certain aspects of the bill suggest that it should be understood as preserving United States sovereignty over Puerto Rico. If the bill is read in this way, section 2(1) raises the question whether a statute can constitutionally provide that the United States citizenship of those currently possessing such citizenship-- and who have been granted it without condition -- is "nonrevocabl[e]." The leading case with respect to this question is *Afroyim v. Rusk*, 387 U.S. 253 (1967).

Afroyim, who had been naturalized in the United States, challenged the constitutionality of a statute providing for involuntary expatriation of persons who had voted in foreign elections (as he had). The Court held that persons who are citizens of the United States by operation of the Fourteenth Amendment, including naturalized citizens, cannot in general be deprived of that citizenship unless they voluntarily relinquish it. The Court in *Afroyim* also rejected the proposition "that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen=s citizenship without his assent." *Id*. at 257. While we believe that, under the better view of the law, birth in Puerto Rico does not confer citizenship pursuant to the Fourteenth Amendment, *Afroyim=s* conclusion that, even apart from the Fourteenth Amendment, Congress lacks a "general power . . .to take away an American citizen=s citizenship without his assent," *id.*, is directly relevant here. *Afroyim* appears to support the proposition that, with the exception of limited circumstances not applicable in the context of H.R. 4751, once citizenship is irrevocably granted, it cannot be taken away (regardless of whether it is Fourteenth Amendment citizenship).

A counter-argument might be made based on the Supreme Court=s subsequent decision in *Rogers v. Bellei*, 401 U.S. 815 (1970). In *Rogers*, the Court upheld the loss of citizenship of an individual who was born in Italy and who acquired citizenship at birth under a federal statute because one of his parents was an American citizen. The federal statute under which he became a citizen upon birth abroad to a United States citizen required, however, that persons claiming citizenship on this basis had to meet residency requirements in the United States prior to their 28th birthday. Bellei failed to comply with this residency requirement, but argued that under Afroyim he was nonetheless entitled to retain his U.S. citizenship. While the *Rogers* Court criticized *Afroyim*=s language concerning non-Fourteenth Amendment citizenship and based its own

holding in part on the fact that Bellei=s citizenship was not conferred pursuant to the Fourteenth Amendment, *see* 401 U.S. at 835, *Rogers* is best understood as addressing the legitimacy of pre-established requirements for statutorily conferred citizenship (including conditions subsequent such as the residency by age 28 requirement) when Congress grants citizenship to those who would not otherwise receive it directly by operation of the Fourteenth Amendment. That issue -- of the legitimacy of pre-established requirements -- is not relevant to Congress= powers to divest citizenship once it has been unconditionally conferred. *Afroyim* thus appears to be the most relevant precedent, and it supports the view that, so long as Puerto Rico remains part of the United States, citizenship that has been granted is constitutionally protected.

If H.R. 4751 is understood as envisioning the creation of an independent nation, the constitutional analysis is more complicated. There is case law that indicates that a change in sovereignty severs the individual=s ties with the country that had previously exercised sovereignty over the place that person inhabits. Thus, Chief Justice John Marshall observed in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828), upon the cession of a territory the relations of its inhabitants "with their former sovereign are dissolved, and new relations are created between them, and the government which has acquired their territory. The same Act which transfers their country, transfers the allegiance of those who remain in it." *See also Boyd v. Nebraska ex rel. Thayer,* 143 U.S. 135, 162 (1892) ("[M]anifestly, the nationality of the inhabitants of territory acquired by . . . cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal, or otherwise, as may be provided."); *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 87 (1833). *Cf. Rabang v. Boyd*, 353 U.S. 427 (1957) (holding as a matter of statutory interpretation that an individual who had been born in the Philippines before independence, and who was therefore a non-citizen national of the United States, had become an alien upon Philippine independence). Moreover, the Department of Justice in 1991 suggested that should Puerto Rico become independent, its residents "should be required to elect between retaining United States citizenship (and ultimately taking up residence within the United States . . .)," and citizenship in the new republic of Puerto Rico. Thornburgh Testimony, Section by Section Analysis, at 206-07. In that analysis the Department concluded that *Bellei* would support the constitutionality of a requirement that residents of a newly independent Puerto Rico elect between citizenship in that new nation and retention of their of United States citizenship. *Id* at 207. At the same time, we recognize that there is case law suggesting that Congress lacks power to sever citizenship over the objection of one who is a citizen and who has satisfied all pre-existing conditions for citizenship. While decision such as *Canter* suggest that a change in a territory=s sovereignty would sever citizenship in the prior sovereign, the Supreme Court has not directly addressed the effects of granting independence to a former territory upon the continued United States citizenship of persons continuing to reside there. The issue presents difficult questions involving the relationship between the United States citizenship held by people in Puerto Rico by virtue of ' 302 of the INA, Congress= power to impose conditions on retention of citizenship, and the assumptions of international law that nationality follows sovereignty.

IV.

The final constitutional issue that I will discuss concerns the bill=s provision on representation. Section 3(26) of the bill calls for the election of a Resident Commissioner "to represent Puerto Rico before the United States Government . . . who shall be considered as a Member of the United States House of Representatives as regards any legislative matter relating to Puerto Rico." The applicable provision of the United States Constitution -- art. I, ' 2, cl.1 -- provides, however, that the House of Representatives "shall be composed of Members chosen every second Year by the People *of the several States*" (emphasis added). On its face, that language would seem to mean that the Resident Commissioner from Puerto Rico could not be

"considered as a Member" of the House because, under H.R. 4751, Puerto Rico would not be a "State." While Congress has the ability to permit participation by representatives of the territories, there are constitutional limits to the participation that would be permitted. *See Michel v. Anderson*, 14 F.3d 623, 630-2 (D.C. Cir. 1994) (holding that the House of Representatives had the authority to permit a territorial delegate (including the Resident Commissioner from Puerto Rico) to vote in the House=s committees, including the Committee of the Whole).

Thank you for this opportunity to provide the views of the Department of Justice.

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